

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION**

ORDER NO. R9-2009-0003

ASSESSING

ADMINISTRATIVE CIVIL LIABILITY

FOR VIOLATIONS OF

Order No. 99-72 (NPDES No. CA0107981) and

Order No. R9-2003-0394 (NPDES No. CA0108944)

TO

City of Escondido

This Order is issued in reference to an adjudicative proceeding initiated by the issuance of Administrative Civil Liability Complaint No. R9-2005-0265, dated December 30, 2005 ("Complaint") which proposed to assess a total of \$1,335,000 in mandatory minimum penalties and \$462,250 in discretionary liability, for a recommended civil liability of \$1,797,150 against the City for certain alleged violations of effluent limitations prescribed in Order No. 99-72 (NPDES No. CA0107981) and Order No. R9-2003-0394 (NPDES No. CA0108944).

The City submitted an original settlement offer to the Regional Board on September 13, 2006. On October 11, 2006, the Regional Board adopted Settlement Order No. R9-2006-0095 which imposed civil liability in the amount of \$1,162,150. Of that amount, the Settlement Order required the City to deposit \$690,000 in the State Water Board Cleanup and Abatement Account and provided that \$462,150 shall be suspended and waived if the City submits a final copy of two technical studies. This Settlement Order was challenged in a Petition by The Escondido Creek Conservancy and San Diego Coastkeeper. On October 2, 2007, the State Water Resources Control Board issued an Order vacating ACL Order No. R9-2006-0095 and remanded the matter back to the Regional Board. According to the remand, the amount of liability must be no less than the minimum liability required by Water Code section 13385 (\$1,335,000), based on the factual determinations of the Regional Board.

9-2009-0003

The parties to this proceeding are the **Regional Water Quality Control Board, San Diego Region's ("Regional Board") Prosecution Team** and the **City of Escondido**. The **Escondido Creek Conservancy** and the **San Diego Coastkeeper** were granted party status to this proceeding in accordance with Title 23, California Code of Regulations section 648.1, but are not parties to the Settlement Agreement.

The Regional Board has been presented with a proposed settlement of the claims alleged in the Complaint that has been developed during negotiations between the City and Prosecution Team representatives. The Escondido Creek Conservancy and the San Diego Coastkeeper are not parties to the Settlement. The proposed Settlement represents a mutually agreed-upon resolution of the Prosecution Team's claims through the payment of an administrative civil liability in the amount of \$1,335,000. The Settlement Agreement is attached hereto as **Attachment A**. The City and the Prosecution Team recommend that the Regional Board issue this Order to effectuate their proposed Settlement. Having provided public notice of the proposed settlement and not less than thirty (30) days for public comment, **the Regional Board finds that:**

1. During the settlement negotiations between all four parties, the City proposed a Supplemental Environmental Project (SEP) involving the purchase of two parcels of land near the Escondido Creek. The SEP is supported by The Escondido Creek Conservancy and the San Diego Coastkeeper. The Prosecution Team, however, has determined that the SEP does not meet criteria necessary under the Enforcement Policy for reasons summarized in the Settlement Agreement, and, therefore recommends against adoption of the SEP.
2. The City supports the SEP as proposed, but desires to resolve the Complaint even without the SEP if necessary to reach a Settlement. The City, therefore, supports an Order that requires payment by the City to the State Water Resources Control Board's Cleanup and Abatement Account in the amount of \$1,335,000.
3. The Escondido Creek Conservancy and the San Diego Coastkeeper continue to support the SEP as proposed and do not support a Settlement that does not include a SEP.
4. In accepting the proposed Settlement, in particular, with respect to the elimination of the discretionary liability, the Regional Board has considered each of the factors prescribed in California Water Code §13385(e). The Regional Board's consideration of these factors is based upon information obtained by the Regional Board in investigating the Claims or otherwise provided to the Regional Board, including the information presented at the noticed proceeding before the Board. In addition to these factors, the administrative civil liability recovers the costs incurred by the staff of the

Regional Board in evaluating the Claims and preparing the Complaint and related documents which totals \$111,479.

5. A notice of the settlement and assessment of civil liability was posted on the Regional Board web site and published in the San Diego Union Tribune on or before January 9, 2009 notifying the public of a 30-day review period and soliciting public comments on the terms of the settlement. The proposed settlement supports the assessment of administrative civil liability in the amount of \$1,335,000 for the Claims and is in the public interest. This settlement and assessment of administrative civil liability provides for the full and final resolution of each of the Claims.
6. Issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code Section 21000 *et seq.*) in accordance with section 15321, Chapter 3, Title 14, California Code of Regulations. This action is also exempt from the provisions of CEQA in accordance with section 15061(b)(3) of Chapter 3, Title 14 of the California Code of Regulations because it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.

IT IS HEREBY ORDERED that:

1. Administrative civil liability under California Water Code Section 13385(c) is imposed upon the City of Escondido in the amount of \$1,335,000.
2. Within 30 calendar days of receiving written notice from the Regional Board Executive Officer that this Order has become final and is no longer subject to challenge by any party or member of the public, the City shall pay the sum of \$1,335,000 to the State Water Resources Control Board, Cleanup and Abatement Account.
3. The Executive Officer is authorized to refer this matter to the Office of the Attorney General for enforcement if the City fails to comply with paragraphs 1 and 2.
4. Fulfillment of the City's obligations under this Order constitutes full and final satisfaction of any and all liability for each Claim in the Complaint.

4-23-09 / \$1,335,000 / 3

I, John H. Robertus, hereby certify the foregoing is a full, true, and correct copy of an order imposing civil liability assessed by the California Regional Water Quality Control Board, San Diego Region, on February 11, 2009.



JOHN ROBERTUS
Executive Officer

allegations described in the Complaint without a formal hearing. Therefore, the City enters into this Agreement without the admission of any fact or the adjudication of any issue in this matter, and by entering into this Agreement the City is not admitting to liability for any of the alleged violations.

F. The Parties, through their respective representatives, have reached this Settlement to address the violations alleged in the Complaint. This settlement is subject to public comment as provided below.

G. The terms of the settlement are that the City will, in exchange for a full and final release of all claims arising out of the specified alleged violations, pay an administrative civil liability in the total amount of \$1,335,000.

H. The City, in conjunction with The Escondido Creek Conservancy and San Diego Coastkeeper, has submitted a Supplemental Environmental Project ("SEP") proposal involving the purchase of two parcels of land located along Escondido Creek, the water body affected by the alleged violations. The terms and conditions of the SEP are detailed in **Attachment B** ("the SEP"), which is attached hereto. The Prosecution Team has considered the proposal and finds it unacceptable for reasons previously communicated to the City, the Escondido Creek Conservancy and the San Diego Coastkeeper, including (a) lack of appropriate documentation regarding the value of the properties; (b) lack of a specific method for holding of purchase money pending closing of the proposed property purchase; (c) no specific mechanism to preserve permanent protection through conservation easement or other means included in the proposal; (d) no review of existing easements has been included to assess the overall value of the acquired properties and the sustainability of habitat values; (e) no information has been provided to indicate whether or not the Barnett Property conveys any water rights which would increase the value significantly; (f) inadequate explanation as to why the Lish Property would improve water quality in Escondido Creek when it is only within the 500 year flood plain; (g) no third party audit information has been included in the SEP Application to ensure compliance. The City does not agree with the Prosecution Team's evaluation of the SEP proposal.

I. No Settlement is intended between the parties regarding the SEP, except as to discussion of the SEP before the Regional Board. This Agreement is limited to fixing the amount of the administrative civil liability that shall be paid by the City as a result of the Complaint.

NOW, THEREFORE, in exchange for their mutual promises and for other good and valuable consideration specified herein, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. The Parties covenant and agree that they will not contest or otherwise challenge this Agreement before the Regional Board, the State Water Resources Control Board or any court.

2. In accordance with the remand from the State Water Resources Control Board, the City's submittal of the two technical reports complies with the requirement imposed on the City and supports a final suspension of the discretionary penalties, comprised of the \$462,150 amount for alleged violation of Directives No. 2 and 4 of Cease and Desist Order No. 93-31, Directive No. 2 of Addendum No.1 of Cease and Desist Order No. 93-31, Discharge Specification B.1 of Order No. 93-70, Discharge Specification B.5 of Order No. R9-2003-0394, and Prohibition A.1 of Order No. 99-72. Copies of each Directive, Specification and Prohibition are attached hereto as **Attachment C**.

3. The Regional Board is authorized to impose an Order in the amount of \$1,335,000 in this matter, and that amount satisfies the State Water Resources Control Board's Remand Order requiring imposition of a Minimum Mandatory Penalty pursuant to Water Code Section 13385. The entry of such an Order would satisfactorily resolve Complaint No. R9-2005-0265 and the State Board's remand Order WQ 2007-0010.

4. The City agrees to pay a total sum of \$1,335,000 in administrative civil liability to resolve Complaint No. R9-2005-0265 and the State Board's remand Order WQ 2007-0010.

5. The City does not agree with the Prosecution Team's view of the adequacy of the SEP proposal and reserves its right to submit its comments about the adequacy of the SEP to the Regional Board. Accordingly, the Parties recognize that the Regional Board may decide to enter such orders as it deems appropriate with respect to the use of up to 50% (pursuant to Water Code Section 13385) of the \$1,335,000 to fund the City's current SEP proposal. However, if the Regional Board, in its discretion, enters an order that requires payment of the assessment and does not include any provision for the SEP, the City agrees that it will not contest that order and will not file a petition with the State Board.

6. Notwithstanding its refusal to support the SEP proposal, the Prosecution Team agrees that the City, The Escondido Creek Conservancy and the San Diego Coastkeeper may propose the SEP directly to the Regional Board. The Prosecution Team reserves its right to comment to the Regional Board on the SEP proposal and to answer questions from the Board and its advisory staff about the Prosecution Team's refusal to support the SEP proposal. The Parties recognize that the lack of Prosecution Team support for the SEP proposal may result in entry by the Board of an order requiring that the City pay the entire \$1,335,000 assessment directly to the State Water Resources Control Board's Cleanup and Abatement Account. A copy of a proposed order for that purpose is attached as "Attachment D". In the event that the Regional Board decides to enter an order supporting use of part of the assessment (up to 50%) toward the proposed SEP, a proposed order for that purpose is attached as "Attachment E" and is provided by the City to enable the Regional Board to adopt an order that includes the SEP without need for delay of the proceeding, currently scheduled for February 11 2009. The City's proposed order, if adopted, would provide that the City would pay half of the assessment to the Cleanup and Abatement Account and half to fund the SEP.

7. The Parties anticipate that this Settlement Agreement will be presented to the Regional Board at a regularly scheduled meeting on February 11, 2009. However, this Agreement remains in effect in the event that it cannot be presented to the Regional Board until a later date and until it is rescinded by the Parties. The Prosecution Team, the City, The Escondido Creek Conservancy and the San Diego Coastkeeper, as currently designated parties, and other interested parties may address the Regional Board regarding the SEP proposal. The Parties further recognize that in the event that the Board supports the SEP proposal, but finds that further work to develop the SEP is necessary, the matter may be continued with respect to the SEP proposal exclusively for the purpose of completion of any necessary work to effectuate the SEP proposal. However, the Parties agree to request that the Regional Board enter an order to resolve the assessment amount in accordance with the terms of this Settlement without further delay.

8. The City and its respective successors and assigns, agents, attorneys, employees, and representatives hereby release and discharge the Regional Board and the State of California, including each and every constituent agency, board, department, office, commission, fund or entity thereof, and successors and assigns, agents, attorneys, employees, officers, shareholders and representatives of the Regional Board, the State of California, and each and every constituent of the State of California from any and all claims, demands, actions, causes of action, obligations, damages, penalties, liabilities, debts, losses, interest, costs, or expenses of whatever nature, character, or description, that they may have or claim to have against one another by reason of any matter or omission arising from any cause whatsoever relating to the Complaint and this Agreement.

9. The City's complete performance of its obligations under this Agreement shall effect a release and discharge of the City and its respective successors and assigns, agents, attorneys, employees, and representatives by the Regional Board from any and all claims, demands, actions, causes of action, obligations, damages, penalties, liabilities, debts, losses, interest, costs, or expenses of whatever nature, character, or description, that it may have or claim to have against the City by reason of any matter or omission arising from any cause whatsoever relating to the Complaint and this Agreement. Notwithstanding this section, however, the Regional Board expressly reserves its rights under Civil Code section 1542. 10. Upon execution of this Agreement by the Parties, the Executive Officer shall publish the availability of the Agreement for the purpose of accepting public comments on the Agreement for a period of 30 days. The City agrees that it may not rescind or otherwise withdraw its approval of the Agreement. The Agreement becomes effective immediately upon execution.

11. The Parties intend that the procedure that has been adopted for the approval of the settlement by the Parties and review by the public, as reflected in this Agreement, will be adequate. In the event procedural objections are raised prior to this settlement becoming effective, the Parties agree to meet and confer concerning any such objections, and may agree to revise or adjust the procedure as necessary or advisable under the circumstances.

12. In the event that this Agreement does not take effect, or is vacated in whole or in part by the State Water Resources Control Board or a court, the Parties acknowledge that they expect to proceed to a contested evidentiary hearing for the Regional Board to determine whether to assess administrative civil liabilities for the underlying alleged violations, unless the Parties agree otherwise. The Parties agree that all oral and written statements and agreements made during the course of settlement discussions, except this Agreement, will not be admissible as evidence in the hearing. The Parties also agree to waive any and all objections related to their efforts to settle this matter, including, but not limited to, objections related to prejudice or bias of any of the Regional Board members or their advisors and any other objections that are premised in whole or in part on the fact that the Board Members or their advisors were exposed to some of the material facts and the Parties' settlement positions, and therefore may have formed impressions or conclusions, prior to conducting the contested evidentiary hearing.

13. Neither this Agreement nor any payment pursuant to the Agreement shall constitute evidence of, or be construed as, a finding, adjudication, or acknowledgment of any fact, law or liability, nor shall it be construed as an admission of violation of any law, rule or regulation. However, this Agreement and/or any actions or payment pursuant to the Agreement may constitute evidence in actions seeking compliance with this Agreement. This Agreement may be used as evidence of a settlement in any future actions by the Regional Board.

14. Each person executing this Agreement in a representative capacity represents and warrants that he or she is authorized to execute this Agreement on behalf of and to bind the entity on whose behalf he or she executes the Agreement.

15. This Agreement shall not be construed against the party preparing it, but shall be construed as if the Parties jointly prepared this Agreement and any uncertainty and ambiguity shall not be interpreted against any one party.

16. If any portion of this Agreement is ultimately determined not to be enforceable, the entire Agreement shall become null and void.

17. This Agreement shall not be modified by any of the Parties by oral representation made before or after the execution of this Agreement. All modifications must be in writing and signed by the Parties.

18. Each party to this Agreement shall bear all attorneys' fees and costs arising from that party's own counsel in connection with the matters referred to herein.

19. The Parties shall execute and deliver all documents and perform all further acts that may be reasonably necessary to effectuate the provisions of this Agreement.

20. This Agreement may be executed as duplicate originals, each of which shall be deemed an original Agreement, and all of which shall constitute one agreement.

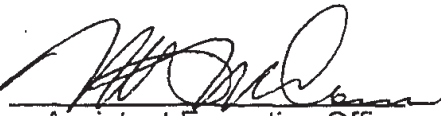
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R9-2005-0265

21. This Agreement is entered into and shall be construed and interpreted in accordance with the laws of the State of California.

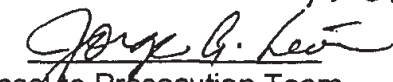
IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the dates set forth below.

For the Regional Board Prosecution Team:

Date: _____

By: 
Assistant Executive Officer
Jan. 5, 2009

Approved as to Form: _____


Counsel to Prosecution Team
Jan 5, 2009

For the City of Escondido:

Date: _____

By: _____

Approved as to Form: _____

Counsel to City of Escondido

21. This Agreement is entered into and shall be construed and interpreted in accordance with the laws of the State of California.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the dates set forth below.

For the Regional Board Prosecution Team:

Date: _____

By: _____
Assistant Executive Officer

Approved as to Form: _____

Counsel to Prosecution Team

Joseph G. Leavitt
Jan 5, 2009

For the City of Escondido:

Date: 1/3/09

By: *John Vinton*

Approved as to Form: _____

Counsel to City of Escondido

Ally Taylor
Jan. 5, 2009